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No. 08-267

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JACOB DENEDO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF FORMER JUDGE ADVOCATES GENERAL, MILITARY JUDGES AND SENIOR MILITARY LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT*

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INTEREST OF THE AMICI CURIAE[1]

Amici are retired senior military officers of all branches of the service, including trial judges, appellate judges, and two former Judge Advocates General. They have an interest in the fair administration of military justice and the integrity of the military trial and appellate court system.

Colonel Eileen M. Albertson, USMC (Ret.), served almost thirty years in the Marine Corps, including service for four years as a judge on the U.S. Navy-Marine Corps Court of Military Review (now renamed the U.S. Navy-Marine Corps Court of Criminal Appeals). She also served with the Military Justice Division of the Office of the Judge Advocate General of the Navy reviewing Article 69 and 73 petitions.

Captain Kevin J. Barry, U.S. Coast Guard (Ret.), served as Chief Trial Judge for the U.S. Coast Guard, and as an appellate military judge on the Coast Guard Court of Military Review (now renamed the U.S. Coast Guard Court of Criminal Appeals). He retired

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[1]The parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

from active service in 1990, and for the next fifteen years maintained a private law practice limited to military and veterans cases.

Captain Frank Burnette, USNR (Ret.), served twenty-seven years in the United States Navy, including service as a general court-martial judge. He is currently in private practice focusing on criminal defense work in federal and state courts.

Rear Admiral Donald J. Guter, JAGC, USN (Ret.), was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. He was Dean of Duquesne University School of Law in Pittsburgh, Pennsylvania from August 2005 through December 2008 and now serves as a Professor of Law on the faculty.

Commander Mary T. Hall, USN (Ret.), served seventeen years in the United States Navy, including as a special court-martial judge prior to being certified as a general court-martial judge. She is now a civilian practitioner whose practice is devoted exclusively to military law.

Rear Admiral John D. Hutson, JAGC, USN (Ret.) served twenty-eight years in the

United States Navy, including service as Judge Advocate General of the Navy and Commanding Officer of the Naval Justice School in Newport, Rhode Island. He is now the President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Colonel J. Wayne Kastl, USAF (Ret.), served twenty-eight years in the United States Air Force, including seven and a half years as a judge on the U.S. Air Force Court of Military Review (now renamed the U.S. Air Force Court of Criminal Appeals). He now practices law in Maryland.

Colonel Calvin Lewis, USA (Ret.), served twenty five years in the United Army, including service as Deputy Commandant and Director of Academics at the U.S. Army Judge Advocate General's School in Charlottesville, Virginia and Chief Circuit Judge, Far East Circuit, South Korea. He currently serves as Associate Dean for Student Affairs and Diversity at the Texas Tech University School of Law.

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Col. Richard D. Rosen, USA (Ret.) is an Associate Professor of Law and the Director of the Center for Military Law and Policy at the Texas Tech University School of Law. His assignments during his twenty-six year career as an Army judge advocate included service as Commandant (Dean) of the Judge Advocate General's School, United States Army; Staff Judge Advocate of the III Armored Corps in Fort Hood, Texas; Staff Judge Advocate of the 1st Cavalry Division; and Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff.

Lieutenant Colonel Eric Stone, USMC (Ret.), served twenty-one years in the United States Marine Corps, including as a trial-level military judge and service as a judge on the U.S. Navy-Marine Corps Court of Criminal Appeals. He served as Deputy Director of the Navy-Marine Corps Appellate Defense Division, as Appellate Government Counsel of the Navy-Marine Corps Appellate Government Counsel Division, and as a criminal law advisor to the Judge Advocate General of the United States Navy. He now practices law in the Commonwealth of Virginia.

SUMMARY OF ARGUMENT

The system of military courts established by Congress and existing in their modern form for over half a century is responsible for the fair administration of criminal justice for members of the United States armed forces throughout the world. A long-recognized feature of appellate review in such courts, as in civilian courts, is the power to issue writs necessary or appropriate in aid of their goal of rendering correct, fair and proper judgments. The military courts have over time exercised this power sparingly and for good purpose, and this Court has on two occasions explicitly confirmed their power to do so.

The Government, reversing a position it has taken on previous occasions, but consistent with arguments it has made unsuccessfully before in this Court, seeks to strip the military courts of at least some of their power to grant such relief – although in light of concessions made in its brief, it is less than clear how far the Government's argument extends. None of its arguments supports a reversal of this Court's precedents upholding this jurisdiction. The Government's attempt to deprive the military court system of its power to correct fundamental errors on collateral review is contrary to settled law, based on a misunderstanding of the military court system,

and detrimental to the fair administration of justice.

ARGUMENT

I

MILITARY JUSTICE IN THE UNITED STATES IS A COMPREHENSIVE SYSTEM OF PROCEDURAL AND SUBSTANTIVE CRIMINAL LAW RESPONSIBLE FOR THE FAIR ADMINISTRATION OF JUSTICE TO ALL OF THIS COUNTRY'S SERVICE MEMBERS

Since even before[2] the Constitution granted the Congress power "To make Rules for the Government and Regulation of the land and naval Forces,"[3] criminal jurisdiction over the United States armed forces has been exercised by a self-contained, largely autonomous system of military justice. Whatever its changing structure, this system has been responsible for the knowledgeable, fair, efficient, and reliable administration of criminal law in the military context.

Over two hundred years of experience have seen progress in professionalism, process, and personnel, accelerated by the adoption of

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[2] HOMER E. MOYER, JUSTICE AND THE MILITARY §§ 1-112, 1-113 (1972).

[3] U.S. CONST. art. I, § 8, cl. 14.

the Uniform Code of Military Justice ("UCMJ") in 1950.[4] The operation of that system of law is modern and comprehensive. The UCMJ established not only a code of substantive and procedural law, but also a tiered system of judicial review, including intermediate appellate courts, culminating in the United States Court of Appeals for the Armed Forces, formerly the United States Court of Military Appeals.[5] The Military Justice Acts of 1968[6] and 1983[7] improved standards for court-martial personnel[8] and added certiorari jurisdiction in this Court.[9] With a jurisdiction that is world-wide[10] and extends to any offenses committed by service members, without regard to their nature or service connection, *Solorio v. United States*, 483 U.S. 435 (1987), an annual appellate caseload in excess of 3400,[11] a high court with over 1,000 dispositions in its most recent reporting year,[12] and over thirty thousand

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[4] Pub. L. No. 81-506, 64 Stat. 107, 149, eff. May 31, 1951.
[5] UCMJ arts. 67, 141-45, 10 U.S.C. §§ 867, 941-45.
[6] Pub. L. No. 90-632, 82 Stat. 1335.
[7] Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405.
[8] UCMJ arts. 26, 66, 10 U.S.C. §§ 826, 866.
[9] UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259.
[10] UCMJ art. 5, 10 U.S.C. § 805.
[11] USCAAF, Annual Report of the Code Committee on Military Justice, Appendix (for the period Oct. 1, 2006 to Sept. 30, 2007).
[12] *Id.*

lawyers admitted to its bar,[13] this country's system of military law well deserves the description of one commentator as "The nation's largest criminal jurisdiction."[14]

As such, the military justice system bears the same heavy responsibility as state and federal civilian courts to administer justice fairly, reliably and efficiently. The thousands of service members tried each year are at risk of the same severe consequences as civilian defendants, up to and including the death penalty, which has been imposed in at least fifteen cases since the military death penalty was restored in 1984.[15]

Since the adoption of the UCMJ, this Court has recognized the seriousness and dignity of court-martial proceedings, moving beyond the rough-and-ready system of Colonel Winthrop's day to the holding of *Solorio*, extending jurisdiction to all offenses by service members as a matter of status, and concluding that "civil courts are ill equipped to establish policies regarding matters of military

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[13] 2 JONATHAN LURIE, PURSUING MILITARY JUSTICE, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, xi (1998).

[14] John T. Willis, *The United States Court of Military Appeals – "Born Again"*, 52 Indiana Law Journal 153 (1976).

[15] Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation,* 189 Mil. L. Rev. 1, 17 (2006)

concern...." *Solorio*, 483 U.S. at 448. More recently, Congress expressed its reliance on, and confidence in, the military justice system, by extending its jurisdiction to cover "[I]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field," UCMJ art. 2(a)(10), 10 U.S.C. § 802(a)(10). There can no longer be any doubt that this court system bears all the essential elements of a fully-developed organization of criminal justice.

Amici, who have for decades been involved at the highest levels of the military justice system, and are committed to the fair administration of justice for the community it serves and for the nation at large, are gravely concerned about the implications of the Government's attempt to dismantle a critical part of that system.

II

THE POWER TO CORRECT ERRORS IS AN ESSENTIAL FEATURE OF COMMON LAW, STATUTE AND DECISIONAL LAW IN THE CIVILIAN AND MILITARY COURT SYSTEMS

There can be no more basic requirement of a legitimate judicial system than the need to

reach a just result.[16] The power to correct errors in order to ensure such a result has long been regarded as an inherent attribute of all courts. The very purpose of appellate courts derives from the recognition of both the possibility of error and the need to correct it. Their power is not limited to direct review on appeal, but extends in appropriate cases to collateral review when necessary to prevent injustice.

A. Writs of Error *Coram Nobis* At Common Law

Some courts have characterized their powers to prevent injustice and preserve the integrity of the judicial process, even after the time for direct appeal has passed, as inherent in the nature of courts. *E.g.*, *Dye v. Kansas State Supreme Court,* 48 F.3d 487 (10th Cir. 1995); *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987), *citing Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971); *Powers v. Bethlehem Steel Corp.,* 483 F.2d 963, 965 (1st Cir. 1973); *Clarke v. Boysen*, 273 F. 923 (8th Cir. 1921). More commonly, the traditional vehicle employed is identified as the common law writ of error *coram nobis*, which was available at both King's Bench and Common Pleas to correct fundamental errors of fact or

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[16] *Cf.* Fed. R. Crim. P. 2, which provides that, "These rules are to be interpreted to provide for the just determination of every criminal proceeding...."

law that were not known when judgment was rendered, and for which other appellate or statutory remedies were unavailable.[17] The writ was apparently first recognized in the federal courts by Chief Justice Marshall in *Strode v. The Stafford Justices*, 23 F. Cas. 236, 236-37 (C.C.D. Va. 1810) (No. 13,537).

This Court had occasion to describe the history and availability of the writ of error *coram nobis* in *United States v. Morgan*, 346 U.S. 502 (1954), where it noted that, "While the occasions for its use were infrequent, no one doubts its availability at common law.... It has been used, in the United States, with and without statutory authority but always with reference to its common-law scope – for example, to inquire as to ... failure to advise of right to counsel." 346 U.S. at 508-09 (citations omitted).

The particular function of the writ of error *coram nobis* is to avoid miscarriage of justice in cases of continuing risk of civil disability, where appellate and statutory remedies are unavailable, and when, because the applicant is not in custody, *habeas corpus* relief is inappropriate. It is available to correct errors "of the most fundamental character," *United States v. Mayer*, 235 U.S. 55, 69 (1914),

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[17] *Dobie v. Commonwealth*, 198 Va. 762, 768-69, 96 S.E.2d 747, 752 (1957).

among which is violation of the right to counsel, *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Walker v. Johnston,* 312 U.S. 275 (1941). The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

This Court has specifically recognized that exposure to deportation on the basis of a criminal conviction is a form of civil disability that renders exercise of the court's power to correct errors appropriate. *Fiswick v. United States*, 329 U.S. 211 (1946) (granting relief over claim of mootness where sentence had been served). Again, in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), this Court rejected a jurisdictional challenge to collateral review of court-martial proceedings, because the consequences of a court-martial conviction extend beyond confinement to potential deprivation of pay and dismissal from the service. Much more serious are the consequences in the case at bar, where respondent faces deportation. *Lehmann v. United States*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ("To banish respondent from home, family, and adopted country is punishment of the most drastic kind....")

Failure to provide adequate counsel is a common theme of *coram nobis* cases, in both the civilian and military courts. *Morgan* itself involved such a claim, as did *United States v.*

Michaud, 925 F.2d 37 (1st Cir. 1991), *Spence v. Dowd*, 145 F.2d 451 (7th Cir. 1944), and *Tillman v. United States*, 32 M.J. 962 (A.C.M.R. 1991).

B. Writs of Error In Statutory Law

In codifying the All Writs Act as part of Title 28 in 1948, Congress was "making explicit the right to exercise powers implied from the creation of such courts [*i.e.*, "courts established by Act of Congress"]". Reviser's Note, Historical and Revision Notes, 28 U.S.C. § 1651(a). The Reviser's Note was quoted with approval in *Morgan*, 346 U.S. at 506 n. 6, and again in *Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969), which concerned a court-martial sentence. In concluding that the writ was available as a distinct remedy, *Morgan* explicitly disposed of the Government's arguments that either Civil Rule 60(b) (now Rule 60(e)), abolishing "bills in the nature of ...writs of coram nobis" in civil proceedings, or 28 U.S.C. § 2255, authorizing collateral review of sentences by prisoners in custody, superseded or abolished *coram nobis* in criminal matters. "Otherwise a wrong may stand uncorrected which the available remedy would right." *Morgan*, 346 U.S. at 512. "As the power to remedy an invalid sentence exists," this Court concluded, "respondent is entitled to an

opportunity to attempt to show that [his] conviction was invalid." *Id.* at 513.

C. Collateral Review of Errors In Military Courts

Against this background, it was no departure from existing law – and certainly not the arrogation of unauthorized power claimed now by the Government – for the Court of Military Appeals to confirm, in *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), that it was authorized to entertain and adjudicate applications for writs of error *coram nobis*. *Frischholz* relied on the logic and holding of *Morgan*, the Reviser's Note, and a careful reading of the All Writs Act. It rejected the Government's argument that the Act's explicit grant of jurisdiction to "all courts established by Act of Congress," 28 U.S.C. § 1651(a), was applicable only to Article III courts. Significantly, the petitioner in *Frischholz* had initially applied to the United States District Court, and was turned away with the direction to apply to the Court of Military Appeals. 16 U.S.C.M.A. at 151, 36 C.M.R. at 307.

This Court has left no doubt that *Frischholz* was correctly decided. In *Noyd*, 395 U.S. at 695 n. 7 (1969), it held that *Frischholz* had "properly rejected" the Government's argument that the Court of Military Appeals

was without power to entertain and grant collateral relief, concluding in powerful language that "we do not believe that there can be any doubt as to the power of the Court of Military Appeals" to do so. Indeed, both the Court's opinion and that of the sole dissenter relied on the power of military courts to grant such relief as a basis for criticizing Captain Noyd's initial resort to civilian courts. Justice Harlan, writing for the Court, specifically invoked the "procedure established to police the errors of the tribunal whose judgment is challenged," emphasizing that Congress "deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges[18] could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd*, 395 U.S. at 694.

Six years later, in the face of the Government's claim that Article 76 of the UCMJ, 10 U.S.C. § 876, precludes collateral review of court-martial convictions in *any* court, this Court again expressed its approval of *Frischholz*, stating, "We therefore reiterate the construction given the Art. 76 language in *Gusik* [*v. Schilder*, 340 U.S. 128 (1950)] and accepted by other courts, *including the Court of*

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[18] UCMJ art. 142(b)(1), 10 U.S.C. § 942(b)(1), requires that judges of the Court of Appeals for the Armed Forces (and the Court of Military Appeals before it) "shall be appointed from civilian life."

Military Appeals," *Councilman*, 420 U.S. at 753 (emphasis supplied; adding a footnote quoting with approval the holding in *Frischholz* that Article 76 "has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved.")

Congress has several times since *Frischholz*, *Noyd*, and *Councilman* reviewed and amended the UCMJ and the Judicial Code provision governing appellate military jurisdiction, Pub. L. No. 90-632, 82 Stat. 1335; Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405; UCMJ arts. 26, 66, 10 U.S.C. §§ 826, 866; UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259, without ever restricting or eliminating writs of error or other forms of collateral review, or expressing the slightest dissatisfaction with either the existing statutory pattern or the decisional law interpreting it.

At the same time, the Discussion accompanying Rule for Courts-Martial 1204(a)(3) of the Manual for Courts-Martial, the Presidential rules promulgated pursuant to Article 36 of the UCMJ, expressly confirms that the Court of Appeals for the Armed Forces may entertain petitions for extraordinary relief and, in the words of the All Writs Act, "may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and

principles of law." R.C.M. 204(a)(3) (Discussion) (2008 ed.)[19]

The military appellate courts, in justifiable reliance on this Court's twice-expressed approval, continue to entertain writs of error to review defective courts-martial. *E.g., Tillman v. United States*, 32 M.J. 962, 965 (A.C.M.R. 1991) (granting writ of error *coram nobis* for ineffective assistance of counsel, noting that "the exercise of extraordinary power in the nature of *coram nobis* involves no more than a court reconsidering its own acts to avoid a miscarriage of justice"); *Thompson v. United States*, 60 M.J. 880 (N.M. Ct. Crim. App. 2005) (granting writ where accused was found not competent to have participated in his appeal). Recognizing the extraordinary nature of such relief, they have done so sparingly, leading respected commentators to conclude, "The fact that the court [of Appeals] can issue extraordinary writs does not mean that it will grant them. Most petitions are unsuccessful." FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 25-90.00 at 25-56 n. 355 (2d ed. 1999) (collecting cases). The

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[19] The Manual adds that, "in the interest of judicial economy, such petitions usually should be filed with and adjudicated before the appropriate Court of Criminal Appeals prior to submission to the Court of Appeals for the Armed Forces" – precisely what respondent did here. *Id.*

Court of Appeals is hardly, as the Government's petition for certiorari (though not its brief on the merits) argued, a court out of control in need of chastisement. The military appellate courts, rather, have taken seriously their obligations, recognized by this Court, to achieve justice through the policing and correction of errors.

III

THE GOVERNMENT'S RENEWED ATTEMPT TO STRIP THE MILITARY COURTS OF THEIR ABILITY TO CORRECT ERRORS ON COLLATERAL REVIEW IS BASED ON ERRONEOUS INTERPRETATIONS OF LAW AND A MISUNDERSTANDING OF THE MILITARY SYSTEM, AND IS DETRIMENTAL TO THE FAIR ADMINISTRATION OF JUSTICE

The Government concedes, albeit in a footnote (Gov't Brief at 28 n. 6), that this Court in *Noyd* upheld the military courts' power to grant emergency writs in appropriate cases. Whatever this Court decides on the facts of this case, there is no basis for stripping the military courts of their crucial power of collateral review.

A. Article 76 Is No Bar to Collateral Review

The Government contends that Article 76 of the UCMJ, 10 U.S.C. § 876, bars collateral review in the military courts after direct appeals are concluded. Such a position is squarely inconsistent with *Councilman*'s favorable citation of *Frischholz*, and its conclusion that Article 76 "has never been held to bar review of a court-martial when fundamental questions of jurisdiction are involved." *Councilman*, 420 U.S. at 753 n. 26.

Moreover, the Government's reading of Article 76 proves too much, because it would bar collateral review not only in Article III courts, as well, but even in the Article I Court of Federal Claims action that the Government elsewhere in its brief (at 11, 35) posits as an alternative avenue for relief. There is nothing in the statute – which grants jurisdiction over collateral review to all "courts established by Acts of Congress" – or in the decisional law, that supports a claim that Article 76, while permitting collateral review in civilian courts, forbids it in military courts. The Government in *Councilman* disclaimed any such distinction, and wisely so in light of *Noyd*, which criticized the petitioner's initial resort to civilian courts rather than the military courts "established to police errors of the tribunal whose judgment is

challenged." *Noyd* 395 U.S. at 694. On this point, *Councilman* and *Noyd* are conclusive.

Nor does it do the Government's argument much good to point to hypothetical alternative grounds for relief under Article 73, the Tucker Act, or suits in the Court of Federal Claims, when no such relief is available to this respondent. It is precisely for such circumstances that *coram nobis* exists.

B. The Government Concedes the Inherent Power of Military Courts to Grant Collateral Relief

Perhaps recognizing the weak underpinnings of its all-out attack on collateral review in military courts, the Government elsewhere concedes that those courts do have inherent power to issue writs, both *before* Article 76 finality (for which (at 26 n. 5) it invents the term "interstitial military-court jurisdiction") and *after* the completion of the appellate process, despite Article 76. The Government nevertheless attempts to draw an artificial distinction, unsupported by authority, conceding the existence of inherent, non-statutory power to enforce a judgment, but denying such power to correct a judgment later found to be wrong. This purported distinction is manufactured out of whole cloth, and has no basis in statute or case law. Indeed, at least

since *Johnson v. Zerbst*, 304 U.S. 458 (1938), clarified that the lack of effective assistance of counsel impairs a court's jurisdiction, the distinction is entirely artificial. In any event, to concede a court's inherent power to set aside a jurisdictional defect, but not a Constitutional one, is to swallow the camel but strain at the gnat, and to deny the most fundamental function of judicial review.

C. *Clinton v. Goldsmith* Is Not to the Contrary

The Government's citation of *Clinton v. Goldsmith*, 526 U.S. 529 (1999), need not long detain this Court. The fundamental difference between this case and *Goldsmith* is that Major Goldsmith's application challenged not the actions or validity of a court-martial, but an executive action over which the military courts neither had nor ever claimed jurisdiction. Indeed, in defining the military courts' collateral jurisdiction to extend to the findings and sentences of courts-martial (as in the case at bar), *Goldsmith* reaffirmed that "military appellate courts are among those empowered to issue extraordinary writs under the [All Writs] Act." 526 U.S. at 534. The authors of COURT-MARTIAL PROCEDURE, *supra*, §25-90.00 at 25-60, are unquestionably correct when they conclude that the issue in *Goldsmith* is a "far cry" from the issue of assistance of counsel.

D. The Government's Claims of Undue Burden are Mistaken and Irrelevant

Finally, the Government's claim that permitting collateral review will strain judicial resources is belied by history, and in any event pales beside the value of rendering judgments free of Constitutional error.

The military courts, like the civilian courts, have a long history of entertaining applications for collateral relief. Being in the best position to know, they offer no complaint of burden, and have, indeed, been exceptionally sparing in their grants of relief. They have developed suitable procedures for conducting post-trial proceedings, *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), which constitute a minuscule portion of their dockets.

Even if such proceedings did constitute a substantial portion of the court's work, perceived workloads should not deter the use of appropriate procedures to attain just results. This Court has long adhered to the spirit of Judge Learned Hand's maxim, "Thou Shalt Not Ration Justice,"[20] in requiring the appointment of counsel, *Gideon v. Wainwright*, 372 U.S. 335

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[20] Delivered on the occasion of the 75th anniversary celebration of the Legal Aid Society of New York, February 16, 1951; *quoted in Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring).

(1963), *Argersinger v. Hamlin,* 407 U.S. 25 (1972), and, more recently, in extending judicial power over extraordinary writs sought by prisoners in military custody, *Boumediene v. Bush*, 553 U.S. ____, 128 S.Ct. 2229, 2261 (2008). Moreover, the Government's solution of directing collateral review to Article III courts, besides being disfavored by *Noyd*, offers no appreciably cheaper solution.

* * *

The Government was right when it argued to the District Court in *Frischholz* that

> The Court of Military Appeals is a court established by Act of Congress, 10 U.S.C. § 867, and it should necessarily follow that that Court should have the same authority under 28 U.S.C.A. 1651(a) that the Supreme Court in the *Morgan* case recognized in civil courts in criminal cases arising and heard in United States District Courts.[21]

The Government was again right when, through the General Counsel of the Department of Defense, it presented testimony concerning

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[21] Government Motion to Dismiss at 7, *Frischholz v. Sec'y of the Air Force* (D.D.C. Apr. 7, 1965) (No. 64-1915).

the availability of collateral review in military appellate courts. The Government's brief (at 26 n. 5) cites this very testimony, but omits its crucial conclusion:

> [C]ases that were subject to Court of Military Review jurisdiction may be reviewed by the Courts of Military Review or the Court of Military Appeals on writs of *coram nobis*.[22]

Those two Government statements correctly set forth the applicable law. This Court should not now lightly take the Government's opportunistic reversal of its position as authoritative.

CONCLUSION

It is a mystery how depriving a court system of its power to correct errors contributes to justice, good order or military discipline. The Government's about-face on collateral review represents an attempt to deny that military courts have the essential attributes of courts to assure the integrity of their judgments.

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[22] *Military Justice Act of 1982, Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. On Armed Services*, 97th Cong. (1982) (statement of William H. Taft IV, General Counsel, Dep't of Defense).

A system of criminal law as essential, comprehensive and active as that established by Congress for the United States military is a serious business, and bears a heavy responsibility to its participants and the nation. Review by civilian courts is extremely rare. Military courts need to get it right, and should not be denied the power to do so, especially in the extraordinary case of serious deprivation of rights in which no other remedy is available.

The Government's position is dismissive of the military justice system and its goal and ability to render fair, credible judgments in which the participants, the law and the country can have confidence.

The judgment of the Court of Appeals should be affirmed.

February 17, 2009

Respectfully submitted,

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